LETTER

FROM

THE ATTORNEY GENERAL.

ATTORNEY GENERAL'S OFFICE, *July* 13, 1861.

SIR: In obedience to a resolution of the House passed yesterday, and by permission of the President, I have the honor to send herewith a copy of my opinion "mentioned in the message of the President delivered to this House at the opening of its present session."

The resolution also requests of me "a copy of the order suspending the writ of *habeas corpus*." As there is no such order in the records or the files of my office, I have ventured to request the Secretary of State to fulfil the pleasure of the honorable House in that particular.

I have the honor to be, most respectfully, sir, your obedient servant,

EDWARD BATES.

The Hon. the SPEAKER *of the House of Representatives.*

To the President:

ATTORNEY GENERAL'S OFFICE, *July* 5, 1861.

SIR: You have required my opinion in writing upon the following questions:

1. In the present time of a great and dangerous insurrection, has the President the discretionary power to cause to be arrested and held in custody, persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity?

2. In such cases of arrest, is the President justified in refusing to

obey a writ of habeas corpus issued by a court or a judge, requiring him or his agent to produce the body of the prisoner, and show the cause of his caption and detention, to be adjudged and disposed of by such court or judge?

To make my answer to these questions at once consistent and plain, I find it convenient to advert to the great principle of government as recognized and acted upon in most, if not all, the countries in Europe, and to mark the difference between that principle, and the great principle which lies at the bottom of our national government.

Most European writers upon government assume, expressly or by implication, that every national government is, and must be, the full expression and representation of the nation which it governs, armed with all it powers and able to assert all its rights. In England, the form of whose government more nearly approximates our own, and where the rights, interests, and powers of the people are more respected and cared for than in most of the nations of the European continent, it has grown into an axiom that "The Parliament is omnipotent," that is, that it can do anything that is possible to be done by legislation or by judgment. For all the ends of government, the Parliament is the nation. Moreover, in Europe generally, the sovereignty is vested visibly in some designated man or set of men, so that the subject people can see their sovereign as well as feel the workings of his power. But in this country it has been carefully provided otherwise. In the formation of our national government, our fathers were surrounded with peculiar difficulties arising out of their novel, I may say unexampled, condition. In resolving to break the ties which had bound them to the British Empire, their complaints were levelled chiefly at the King, not the Parliament nor the people. They seem to have been actuated by a special dread of the unity of power, and hence, in framing the Constitution, they preferred to take the risk of leaving some good undone, for lack of power in the agent, rather than arm any governmental officer with such great powers for evil as are implied in the dictatorial charge to "see that no damage comes to the Commonwealth."

Hence, keeping the sovereignty always out of sight, they adopted the plan of "checks and balances," forming separate departments of government, and giving to each department separate and limited powers. These departments are co-ordinate and coequal—that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together. We have three of these co-ordinate departments. Now, if we allow one of the three to determine the extent of its own powers, and also the extent of the powers of the other two, that one can control the whole government, and has in fact achieved the sovereignty.

We ought not to say that our system is perfect, for its defects (perhaps inevitable in all human things) are obvious Our fathers, having divided the government into co-ordinate departments, did not even try (and if they had tried would probably have failed) to create an arbiter among them to adjudge their conflicts and keep them within their respective bounds. They were left, by design, I suppose, each independent and free, to act out its own granted powers, without any

ordained legal superior possessing the power to revise and reverse its action. And this with the hope that the three departments, mutually coequal and independent, would keep each other within their proper spheres by their mutual antagonism—that is, by the system of checks and balances, to which our fathers were driven at the beginning by their fear of the unity of power.

In this view of the subject it is quite possible for the same identical *question* (not *case*) to come up legitimately before each one of the three departments, and be determined in three different ways, and each decision stand irrevocable, binding upon the parties to each case; and that, for the simple reason that the departments *are* co-ordinate, and there is no ordained legal superior, with power to revise and reverse their decisions.

To say that the departments of our government are co-ordinate, is to say that the judgment of one of them is not binding upon the other two, as to the arguments and principles involved in the judgment. It binds only the parties to the case decided. But if, admitting that the departments of government are co-ordinate, it be still contended that the principles adopted by one department, in deciding a case properly before it, are binding upon another department, that obligation must of necessity be reciprocal—that is, if the President be bound by the principles laid down by the judiciary, so also is the judiciary bound by the principles laid down by the President. And thus we shall have a theory of constitutional government flatly contradicting itself. Departments co-ordinate and coequal, and yet reciprocally subordinate to each other! That cannot be. The several departments, though far from sovereign, are free and independent, in the exercise of the limited powers granted to them respectively by the Constitution. Our government indeed, as a whole, is not vested with the sovereignty, and does not possess all the powers of the nation. It has no powers but such as are granted by the Constitution; and many powers are expressly withheld. The nation certainly is coequal with all other nations, and has equal powers, but it has not chosen to delegate all its powers to this government, in any or all of its departments.

The government, as a whole, is limited, and limited in all its departments. It is the especial function of the judiciary to hear and determine *cases*, not to "establish principles" nor "settle questions," so as to conclude any person, but the parties and privies to the cases adjudged. Its powers are specially granted and defined by the Constitution, art. 3, sec. 2.

"The judicial power shall extend to all *cases* in law and equity arising under this Constitution, the laws of the United States, and treaties made, and which shall be made, under their authority; to all *cases* affecting ambassadors, other ministers, and consuls; to all *cases* of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between States and citizens of other States; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." And that is the sum of its powers, ample and efficient for all the purposes of distribu-

tive justice among individual parties, but powerless to impose rules of action and of judgment upon the other departments. Indeed, it is not itself bound by its own decisions, for it can and often does overrule and disregard them, as, in common honesty, it ought to do, whenever it finds, by its after and better lights, that its former judgments were wrong.

Of all the departments of the government, the President is the most active, and the most constant in action. He is called "the Executive," and so, in fact, he is, and much more also, for the Constitution has imposed upon him many important duties, and granted to him great powers which are in their nature *not executive*—such as the veto power; the power to send and receive ambassadors; the power to make treaties, and the power to appoint officers. This last is not more an *executive* power when used by the President than it is when exercised by either house of Congress, by the courts of justice, or by the people at large.

The President is a department of the government; and, although the only department which consists of a single man, he is charged with a greater range and variety of powers and duties than any other department. He is a *civil magistrate*, not a *military chief;* and in this regard we see a striking proof of the generality of the sentiment prevailing in this country at the time of the formation of our government, to the effect that the *military* ought to be held in strict subordination to the *civil* power. For the Constitution, while it grants to Congress the unrestricted power to declare war, to raise and support armies, and to provide and maintain a navy, at the same time guards carefully against the abuse of that power, by withholding from Congress and from the army itself the authority to appoint the chief commander of a force so potent for good or for evil to the State. The Constitution provides that "the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." And why is this? Surely not because the President is supposed to be, or commonly is, in fact, a military man, a man skilled in the art of war and qualified to marshal a host in the field of battle. No, it is for quite a different reason; it is that whatever skilful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still he is subject to the orders of the *civil magistrate*, and he and his army are always "subordinate to the civil power."

And hence it follows, that whenever the President, (*the civil magistrate*,) in the discharge of his constitutional duty to "take care that the laws be faithfully executed," has occasion to use the army to aid him in the performance of that duty, he does not thereby lose his civil character and become a soldier, subject to military law and liable to be tried by a court-martial, any more than does a civil court lose its legal and pacific nature and become military and belligerent, by calling out the power of the country to enforce its decrees. The civil magistrates, whether judicial or executive, must of necessity employ physical power to aid them in enforcing the laws, whenever they have to deal with

disobedient and refractory subjects; and their legal power and right to do so is unquestionable. The right of the courts to call out the whole power of the county to enforce their judgments, is as old as the common law; and the right of the President to use force in the performance of his legal duties is not only inherent in his office, but has been frequently recognized and aided by Congress. One striking example of this is the act of Congress of March 3, 1807, (2 Stat., 445,) which empowered the President, without the intervention of any court, to use the marshal, and, if he be insufficient, to use the army, summarily to expel intruders and squatters upon the public lands. And that power has been frequently exercised, without, as far as I know, a question of its legality. To call, as is sometimes done, the judiciary the *civil power*, and the President the *military power*, seems to me at once a mistake of fact and an abuse of language.

While the judiciary and the President, as departments of the general government, are co-ordinate, equal in dignity and power, and equally trusted by the law, in their respective spheres, there is, nevertheless, a marked diversity in the character of their functions and their modes of action. The judiciary is, for the most part, passive. It rarely, if ever, takes the initiative; it seldom or never begins an operation. Its great function is *judgment*, and, in the exercise of that function, it is confined almost exclusively to cases not selected by itself, but made and submitted by others. The President, on the contrary, by the very nature of his office, is active; he must often take the initiative; he must begin operations. His great function is *execution*, for he is required by the Constitution, (and he is the only department that is so required,) to "take care that the laws (all the laws) be faithfully executed;" and in the exercise of that function, his duties are coextensive with the laws of the land.

Often, he comes to the aid of the judiciary, in the execution of its judgments; and this is only a part, and a small part, of his constitutional duty, to take care that the laws be faithfully executed. I say it is a small part of his duty, because for every instance in which the President executes the judgment of a court, there are a hundred instances in which he executes the law, without the intervention of the judiciary, and without referring at all to its functions.

I have premised this much in order to show the separate and independent character of the several departments of our government, and to indicate the inevitable differences in their modes of action, and the characteristic diversity of the subjects upon which they operate; and all this as a foundation for the answers which I will now proceed to give to the particular questions propounded to me.

As to the first question: I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful, discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity. And I think this position can be maintained, in view of the principles already laid down, by a very plain argument.

The Constitution requires the President, before he enters upon the

execution of his office, to take an oath that he "will faithfully execute the office of President of the United States, and will, to the best of his ability, preserve, protect and defend the Constitution of the United States."

The duties of the office comprehend all the *executive power* of the nation, which is expressly vested in the President by the Constitution, article 2, sec. 1, and also, all the powers which are specially delegated to the President, and yet are not, in their nature, *executive* powers. For example, the veto power; the treaty making power; the appointing power; the pardoning power. These belong to that class which, in England, are called prerogative powers, inherent in the crown. And yet the framers of our Constitution thought proper to preserve them, and to vest them in the President, as necessary to the good government of the country. The *executive* powers are granted generally, and without specification; the powers *not* executive are granted specially, and for purposes obvious in the context of the Constitution. And all these are embraced within the duties of the President, and are clearly within that clause of his oath which requires him to "faithfully execute the office of President."

The last clause of the oath is peculiar to the President. All the other officers of government are required to swear only "to *support* this Constitution;" while the President must swear to "*preserve, protect*, and *defend*" it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to "take care that the laws be faithfully executed." And this injunction, embracing as it does all the laws—Constitution, treaties, statutes—is addressed to the President alone, and not to any other department or officer of the government. And this constitutes him, in a peculiar manner, and above all other officers, the guardian of the Constitution—its *preserver, protector*, and *defender*.

It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the general government. The duty to suppress the insurrection being obvious and imperative, the two acts of Congress, of 1795 and 1807, come to his aid, and furnish the physical force which he needs, to suppress the insurrection and execute the laws. Those two acts authorize the President to employ for that purpose, the militia, the army, and the navy.

The argument may be briefly stated thus: It is the President's bounden duty to put down the insurrection, as (in the language of the act of 1795) the "combinations are too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." And this duty is imposed upon the President for the very reason, that the courts and the marshals are too weak to perform it. The manner in which he shall perform that duty is not prescribed by any law, but the means of performing it are given, in the plain language of the statutes, and they are all means of force—

the militia, the army, and the navy. The end, the suppression of the insurrection, is required of him; the means and instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed, and could not be prescribed, without a foreknowledge of all the future changes and contingencies of the insurrection. He is therefore, necessarily, thrown upon his discretion, as to the manner in which he will use his means, to meet the varying exigencies, as they arise. If the insurgents assail the nation with an army, he may find it best to meet them with an army, and suppress the insurrection in the field of battle. If they seek to prolong the rebellion and gather strength by intercourse with foreign nations, he may choose to guard the coasts and close the ports with a navy, as one of the most efficient means to suppress the insurrection. And if they employ spies and emissaries, to gather information, to forward secret supplies, and to excite new insurrections in aid of the original rebellion, he may find it both prudent and humane to arrest and imprison them. And this may be done, either for the purpose of bringing them to trial and condign punishment for their crimes, or they may be held in custody for the milder end of rendering them powerless for mischief, until the exigency is past.

In such a state of things, the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty—that is, to suppress the insurrection and execute the laws. And this discretionary power of the President is fully admitted by the Supreme Court, in the case of Martin *vs.* Mott.—(12 Wheaton's Reports, page 19; 7 Curtis, 10.)

This is a great power in the hands of the chief magistrate; and because it is great, and is capable of being perverted to evil ends, its existence has been doubted or denied. It is said to be dangerous, in the hands of an ambitious and wicked President, because he may use it for the purposes of oppression and tyranny. Yes, certainly, it is dangerous—all power is dangerous—and for the all-pervading reason that all power is liable to abuse; all the recipients of human power are men, not absolutely virtuous and wise. Still it is a power necessary to the peace and safety of the country, and undeniably belongs to the government, and therefore must be exercised by some department or officer thereof.

Why should this power be denied to the President, on the ground of its liability to abuse, and not denied to the other departments on the *same grounds*? Are they more exempt than he is, from the frailties and vices of humanity? Or are they more trusted by the law than he is trusted, in their several spheres of action? If it be said that a President may be ambitious and unscrupulous, it may be said with equal truth, that a legislature may be factious and unprincipled, and a court may be venal and corrupt. But these are crimes never to be presumed, even against a private man, and much less against any high and highly-trusted public functionary. They are crimes, however, recognized as such, and made punishable by the

Constitution; and whoever is guilty of them, whether a President, a senator, or a judge, is liable to impeachment and condemnation.

As to the second question:

Having assumed, in answering the first question, that the President has the legal discretionary power to arrest and imprison persons who are guilty of holding criminal intercourse with men engaged in a great and dangerous insurrection, or persons suspected, with "probable cause," of such criminal complicity, it might seem unnecessary to go into any prolonged argument to prove that, in such a case, the President is fully justified in refusing to obey a writ of *habeas corpus* issued by a court or judge, commanding him to produce the body of his prisoner, and state when he took him, and by what authority, and for what cause he detains him in custody—and then, yield himself to judgment, "to do, submit to, and receive whatsoever the judge or court, awarding the writ, shall consider in that behalf."

If it be true, as I have assumed, that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the President to come before him *ad subjiciendum*—that is, to submit implicitly to his judgment—and, in case of disobedience, treat him as a criminal, in contempt of a superior authority, and punish him as for a misdemeanor, by fine and imprisonment. It is no answer to say, as has sometimes been said, that although the writ of *habeas corpus* cannot be issued and enforced against the President himself, yet that it can be against any of his subordinates, for that abandons the principle assumed, of giving relief in "all cases" of imprisonment by color of authority of the United States, and attempts to take an untenable distinction, between the person of the President and his office and legal power. The law takes no such distinction, for it is no respecter of persons. The President, in the arrest and imprisonment of men, must, almost always, act by subordinate agents, and yet the thing done is no less his act than if done by his own hand. But it is possible for the President to be in the actual custody of a prisoner, taken in civil war or arrested on suspicion of being a secret agent and abettor of rebellion, and in that case the writ must be unavailing, unless it run against the President himself. Besides, the whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the chief civil magistrate of the nation, and the most active department of the government, is eminently and exclusively political, in all his principal functions As the political chief of the nation, the Constitution charges him with its preservation, protection and defence, and requires him to take care that the laws be faithfully executed. And in that character, and by the aid of the acts of Congress of 1795 and 1807, he wages open war against armed rebellion, and arrests and holds in safe custody those whom, in the exercise of his political discretion, he believes to be friends of, and accomplices in, the armed insurrection, which it is his especial political duty to suppress. He has no judicial powers. And the judiciary

department has no political powers and claims none, and therefore (as well as for other reasons already assigned) no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.

The jurisdiction exercised under the writ of *habeas corpus* is in the nature of an appeal, (4 Cr., 75.) for as far as concerns the right of the prisoner, the whole object of the process is to re-examine and reverse or affirm the acts of the person who imprisoned him. And I think it will hardly be seriously affirmed, that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States—and especially in a case purely political.

There is but one sentence in the Constitution which mentions the writ of *habeas corpus*—article 1, section 9, clause 2—which is in these words: "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

Very learned persons have differed widely about the meaning of this short sentence, and I am by no means confident that I fully understand it myself. The sententious language of the Constitution, in this particular, must, I suppose, be interpreted with reference to the origin of our people, their historical relations to the mother country, and their inchoate political condition at the moment when our Constitution was formed. At that time the United States, as a nation, had no common law of its own, and no statutory provision for the writ of habeas corpus. Still, the people, English by descent, even while in open rebellion against the English crown, claimed a sort of historical right to the forms of English law and the guarantees of English freedom. They knew that the English government had, more than once, assumed the power to imprison whom it would, and hold them, for an indefinite time, beyond the reach of judicial examination; and they desired, no doubt, to interpose a guard against the like abuses in this country. And hence the clause of the Constitution now under consideration. But we must try to construe the words, vague and indeterminate as they are, as we find them. "The *privilege* of the writ of *habeas corpus* shall not be *suspended*," &c. Does that mean that the writ itself shall not be issued, or, that being issued, the party shall derive no benefit from it? *Suspended*—does that mean delayed, hung up for a time, or altogether denied? *The writ of habeas corpus*—which writ? In England there were many writs called by that name, and used by the courts for the more convenient exercise of their various powers; and our own courts now, by acts of Congress—the judiciary act of 1789, section 14, and the act of March 2, 1833, section 7—have, I believe, equivalent powers.

It has been decided by the Supreme Court, and I doubt not correctly—see Bollman Swartwout's case, (4 Cr., 93,) that "for the meaning of the term *habeas corpus*, resort must be had to the common law, but the power to award the writ, by any of the courts of the United States, must be given by written law." And the same high court (judging, no doubt, by the history of our people and the circumstances of the times) has also decided that the writ of habeas corpus, mentioned in the Constitution, is the great writ *ad subjiciendum*.

That writ, in its nature, action, and objects, is tersely and accurately described by Sir William Blackstone. I adopt his language, as found in his Commentaries, book 3, p. 131. "But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*, directed to the person detaining another and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This is a *high prerogative* writ, and *therefore* by the common law, issuing out of the court of king's bench, not only in term time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the King's dominions; for *the King* is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

Such is the writ of *habeas corpus*, of which the Constitution declares that the privilege thereof shall not be suspended, except when, in cases of rebellion or invasion, the public safety may require it. But the Constitution is silent as to who may suspend it when the contingency happens. I am aware that it has been declared by the Supreme Court, that "if, at any time, the public safety should require the suspension of the powers vested by this act [meaning the judiciary act of 1789, section 14] in the courts of the United States, it is for the legislature to say so. That question depends upon political considerations, on which the legislature is to decide." Upon this, I remark only, that the Constitution is older than the judiciary act, and yet it speaks of the privilege of the writ of *habeas corpus* as a thing in existence; it is in general terms, and does not speak with particular reference to powers which might or might not be granted by a future act of Congress. Besides, I take it for certain that in the common course of legislation, Congress has power, at any time, to repeal the judiciary act of 1789 and the act of 1833 (which grants to the courts and to the judges the power to issue the writs) without waiting for a rebellion or invasion, and a consequent public necessity, to justify, under the Constitution, the suspension of the privilege of the writ of habeas corpus. The court does not speak of suspending the *privilege* of the writ, but of suspending the *powers vested in the court* by the act. The power to issue a writ can hardly be called a *privilege;* yet the right of an individual to invoke the protection of his government in that form may well be designated by that name. And I should infer, with a good deal of confidence, that the court meant to speak only of its own powers, and not of the privilege of individuals, but for the fact that the court ascribes the power to suspend, to the legislature, *upon political grounds.* It says, "that question depends upon political considerations, on which the legislature is to decide." Now, I had supposed that questions did not belong exclusively to the legislature, because they depend upon political considerations, inasmuch as the President, in his constitutional and official duties, is quite as political as is the Congress, and has

daily occasion in the common routine of affairs to determine questions upon political considerations alone.

If by the phrase *the suspension of the privilege of the writ of habeas corpus*, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to *suspend the privilege* of persons arrested under such circumstances. For he is especially charged by the Constitution with the "public safety," and he is the sole judge of the emergency which requires his prompt action.

This power in the President is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency, when the judiciary is found to be too weak to insure the public safety—when (in the language of the act of Congress) there are "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." Then, and not till then, has he the lawful authority to call to his aid the military power of the nation, and with that power perform his great legal and constitutional duty to suppress the insurrection. And shall it be said that when he has fought and captured the insurgent army, and has seized their secret spies and emissaries, he is bound to bring their bodies before any judge who may send him a writ of *habeas corpus*, "to do, submit to and receive whatsoever the said judge shall consider in that behalf?"

I deny that he is under any obligation to obey such a writ, issued under such circumstances. And in making this denial, I do but follow the highest judicial authority of the nation. In the case of Luther *vs.* Borden, (commonly called the Rhode Island case,) reported in 7 Howard, page 1, the Supreme Court discussed several of the most important topics treated of in this opinion, and among them the power of the President alone to decide whether the exigency exists, authorizing him to call out the militia, under the act of 1795. The court affirmed the power of the President in that respect, and denied the power of the court to examine and adjudge his proceedings. The opinion of the court, delivered by the learned Chief Justice Taney, declares that if the court had that power, "then it would become the duty of the court (provided that it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If (says that learned court) the judicial power extends so far, the guarantee contained in the Constitution of the United States (meaning, of course, protection against insurrection) is a guarantee of anarchy and not of order."

Whatever I have said about the suspension of the privilege of the writ of habeas corpus, has been said in deference to the opinions of others, and not because I myself thought it necessary to treat of that subject at all in reference to the present posture of our national affairs.

For, not doubting the power of the President to capture and hold by force insurgents in open arms against the government, and to arrest and imprison their suspected accomplices, I never thought of first suspending the writ of *habeas corpus*, any more than I thought of first suspending the writ of *replevin*, before seizing arms and munitions destined for the enemy.

The power to do these things is in the hand of the President, placed there by the Constitution and the statute law, as a sacred trust, to be used by him, in his best discretion, in the performance of his great first duty—to preserve, protect, and defend the Constitution. And for any breach of that trust he is responsible before the high court of impeachment, and before no other human tribunal.

The powers of the President falling within this general class have been several times considered by the judiciary, and have, I believe, been uniformly sustained, without materially varying from the doctrines laid down in this opinion. I content myself with a simple reference to the cases without encumbering this document, already too long, with copious extracts.—(The Rhode Island case, 7 Howard, page 1; Fleming *vs.* Page, 9 Howard, page 615; Cross *vs.* Harrison, 16 Howard, page 189; the Santissima Trinidad, 7 Wheaton, page 305; Martin *vs.* Mott, 12 Wheaton, page 29.)

To my mind it is not very important whether we call a particular power exercised by the President a *peace* power or a *war* power, for, undoubtedly, he is armed with both. He is the chief civil magistrate of the nation, and being such, and because he is such, he is the constitutional commander-in-chief of the army and navy; and thus, within the limits of the Constitution, he rules in peace and commands in war, and at this moment he is in the full exercise of all the functions belonging to both those characters. The civil administration is still going on in its peaceful course, and yet we are in the midst of war, a war in which the enemy is, for the present, dominant in many States, and has his secret allies and accomplices scattered through many other States which are still loyal and true. A war all the more dangerous, and more needing jealous vigilance and prompt action, because it is an internecine and not an international war.

This, sir, is my opinion, the result of my best reflections, upon the questions propounded by you. Such as it is, it is submitted, with all possible respect, by your obedient servant,

EDWARD BATES,
Attorney General.

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